Mohamad Faisal Anudin bin Azmi v Dato' Mustafa bin Hj Ibrahim (Pengerusi Lembaga Tatertib Kumpulan Sokongan (No 1) Jabatan Imigresen Malaysia, Putrajaya) & Ors

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HIGH COURT (JOHOR BAHRU) — JUDICIAL REVIEW APPLICATION NO JA-25–49–09 OF 2018
AHMAD MURAD JC
30 APRIL 2021

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Public Servants — Dismissal — Dismissal of immigration officer — Immigration officer was dismissed after Disciplinary Board ('DB') found him guilty of four charges of misconduct under Public Officers (Conduct and Discipline) Regulations 1993 — Whether all procedures were followed in dismissal of the officer — Whether decision to dismiss was not tainted by any illegality, procedural impropriety, unreasonableness or disproportionate action or any non-adherence to due process and the rules of natural justice

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The applicant, who was an immigration officer, brought the instant judicial review ('JR') proceedings against the respondents for orders to quash his dismissal from service and to reinstate him to his former post together with payment of all arrears of salary, emoluments, allowances and other benefits due to him. The decision to dismiss the applicant from service pursuant to reg 38(g) of the Public Officers (Conduct and Discipline) Regulations 1993, was made by the Immigration Department's Disciplinary Board ('DB') after it found him guilty of four charges of misconduct. The charges were that while he was on duty at the Bangunan Sultan Iskandar Immigration Office in Johor, he had affixed the Immigration Department's entry/exit passes on the passports of three foreigners without their being present at the immigration checking counter and had thereafter failed to key in the relevant particulars of those foreigners in the department's records. The DB came to its decision after considering the applicant's representations to the charges which were notified to him by way of a show cause letter. The DB's decision to dismiss was upheld by the Disciplinary Appeals Board ('DAB'). Inter alia, the issues raised by the applicant in his JR application were that: (a) the issuance of a second show cause letter containing additional charges after the respondents had cancelled the first show cause letter which he had replied to, was procedurally improper and constituted double jeopardy; (b) the charges were unsustainable for being ambiguous, vague and contradictory; (c) the DB's failure to decide on the alternative charges to the four charges was a serious flaw in the decision-making process; (d) the DB's failure to provide its grounds of decision to the DAB was procedurally improper; (e) the DAB's failure to supply him with documents in order for him to prepare his appeal and of denying him of an oral hearing

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breached the rules of natural justice; and (f) the overall conduct of the respondents in the matter of his dismissal was tainted with *Wednesbury* unreasonableness and violated the rule of proportionality.

Held, dismissing the JR application:

(1) The DB was entitled to abandon its first show cause letter to the applicant. Hence, when the applicant was found guilty of the four charges in the second show cause letter, it could not be said that he had been tried again for the same offence since the applicant was not tried under the first show cause letter. The principle of double jeopardy was not applicable in the present case as that only applied in criminal cases where a person had either been acquitted or convicted of an offence by the court (see paras 12(b) & 14–15).

(2) The four charges against the applicant contained sufficient details about the acts of misconduct as well as the time and place where they were committed. There was nothing vague or contradictory about the four charges. The language used was simple and clear enough for any reasonably literate person to understand. Moreover, the applicant had made his representation to the charges with sufficient clarity and in detail. This showed that the charges were clear and unambiguous. On the issue of the DB's failure to decide on the alternative charges, the simple answer was that the applicant was not found guilty of those charges, hence he was not prejudiced in any way (see para 16(b)–(d)).

(3) Regulation 15(4) of the Public Services Disciplinary Board Regulations 1993 required the DB to provide the grounds for its decision to the DAB and not to the applicant. The DAB had noted the absence of the grounds but, nonetheless, was satisfied with the DB's decision and, after due consideration, decided to affirm the DB's decision. Since reg 15(3) and (4) of the said Regulations did not require the DB's grounds to be provided to the applicant, he could not be prejudiced by the DAB's decision to decide his appeal without the DB's grounds. The DB and DAB had discretion whether or not to provide grounds for their decisions. It was not for the court to question their exercise of discretion (see paras 17 & 19).

(4) The DAB's failure to supply the documents requested by the applicant to prepare his appeal did not amount to a procedural irregularity that vitiated the decisions of the DB and DAB. This was because the applicant's request for the documents was made after the DB proceedings had concluded and the DB had decided on the matter. As to the request for oral hearing by the applicant, this was not an entitlement of the applicant but was within the discretion of both the DB and DAB whether or not to allow the request. Regulation 37(2) and (4) of the Public Officers (Conduct and Discipline) Regulations 1993 expressly provided

that the applicant was only entitled to make a written representation in respect of the charges (see paras 22–23). A

(5) The court would only intervene in disciplinary cases where there was a fundamental procedural flaw in the decision-making process. It was not the court's duty to peruse the decision-making processes of the DB and DAB with a magnifying glass to detect possible minor errors. The court's function was to merely review the process to ensure that the broad categories of natural justice and due process had been complied with (see para 24). B

(6) The decisions of the DB and DAB to dismiss the applicant was not disproportionate or unreasonable but was justifiable for the reason that the Immigration Department performed a very crucial function in guarding against illegal immigrants entering the country and the officers working in that Department were required to act with utmost integrity, honesty and diligence to protect the interests of national security (see para 26). C D

[Bahasa Malaysia summary

Pemohon, yang merupakan pegawai imigresen, mengemukakan prosiding semakan kehakiman semasa ('SK') terhadap responden untuk mendapatkan perintah bagi membatalkan pemecatannya dari perkhidmatan dan mengembalikam semula beliau ke jawatan sebelumnya bersama-sama dengan pembayaran kesemua tunggakan gaji, upah, elaun dan faedah lain yang perlu dibayar kepadanya. Keputusan untuk memecat pemohon dari perkhidmatan menurut peraturan 38(g) Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993, dibuat oleh Lembaga Tatatertib Jabatan Imigresen ('DB') setelah mendapati beliau bersalah atas empat tuduhan salah laku. Pertuduhan tersebut adalah semasa beliau bertugas di Pejabat Imigresen Bangunan Sultan Iskandar di Johor, dia telah melampirkan pas masuk/keluar Jabatan Imigresen pada pasport tiga warga asing tanpa kehadiran mereka di kaunter pemeriksaan imigresen dan selepas itu gagal memasukkan maklumat yang berkaitan dengan warga asing tersebut ke dalam rekod jabatan. DB membuat keputusannya setelah mempertimbangkan representasi pemohon atas pertuduhan yang dimaklumkan kepadanya melalui surat tunjuk sebab. Keputusan DB untuk memecat beliau dikekalkan oleh Lembaga Rayuan Tatatertib ('DAB'). Antara lain, isu yang dibangkitkan oleh pemohon dalam permohonan SKnya adalah: (a) pengeluaran surat tunjuk sebab kedua yang mengandungi pertuduhan tambahan setelah responden membatalkan surat tunjuk sebab pertama yang telah dibalasnya, secara prosedur adalah tidak wajar dan terjumlah kepada pendakwaan dua kali; (b) pertuduhan tersebut tidak dapat dipertahankan kerana ianya tidak jelas, tidak nyata dan bercanggah; (c) kegagalan DB dalam memutuskan pertuduhan alternatif bagi keempat-empat pertuduhan tersebut adalah kecacatan nyata dalam proses membuat keputusan; (d) kegagalan DB untuk memberikan alasan penghakimannya kepada DAB adalah E F G H I

ketidakwajaran prosedur; (d) kegagalan DAB untuk membekalkannya dengan dokumen agar beliau dapat menyediakan rayuannya dan menafikannya dari pendengaran lisan melanggar peraturan keadilan semula jadi; dan (e) tingkah laku responden secara keseluruhan dalam perkara pemecatannya dicemari dengan '*Wednesbury* unreasonableness' dan melanggar peraturan perkadaran.

Diputuskan, menolak permohonan SK:

(1) DB berhak melepaskan surat tunjuk sebab pertamanya terhadap pemohon. Oleh itu, apabila pemohon didapati bersalah atas empat pertuduhan dalam surat tunjuk sebab kedua, ia tidak boleh dikatakan bahawa beliau telah dibicarakan sekali lagi atas kesalahan yang sama oleh kerana pemohon tidak dibicarakan di bawah surat tunjuk sebab pertama. Prinsip pendakwaan dua kali tidak terpakai dalam kes semasa kerana ia hanya terpakai dalam kes jenayah di mana seseorang telah dibebaskan atau disabitkan atas kesalahan oleh mahkamah (lihat perenggan 12(b) & 14–15).

(2) Keempat-empat pertuduhan terhadap pemohon mengandungi perincian yang cukup mengenai tindakan salah laku serta waktu dan tempat di mana ia dilakukan. Tidak ada yang tidak jelas atau bertentangan mengenai empat pertuduhan tersebut. Bahasa yang digunakan cukup mudah dan jelas untuk difahami oleh seorang yang celik akal. Lebih-lebih lagi, pemohon telah membuat representasinya terhadap pertuduhan dengan cukup jelas dan terperinci. Ini menunjukkan bahawa pertuduhan tersebut jelas dan nyata. Mengenai isu kegagalan DB untuk memutuskan pertuduhan alternatif, jawapan mudah adalah bahawa pemohon tidak didapati bersalah atas pertuduhan tersebut, oleh itu beliau tidak diprejudiskan sama sekali (lihat perenggan 16(b)–(d)).

(3) Peraturan 15(4) Peraturan Lembaga Tatatertib Perkhidmatan Awam 1993 mewajibkan DB untuk menyediakan alasan penghakimannya kepada DAB dan bukan kepada pemohon. DAB telah menyatakan ketiadaan tersebut alasan tetapi, bagaimanapun, berpuas hati dengan keputusan DB dan, setelah pertimbangan, memutuskan untuk mengesahkan keputusan DB. Oleh kerana peraturan 15(3) dan (4) Peraturan tersebut tidak mewajibkan alasan DB disediakan kepada pemohon, beliau tidak dapat diprejudiskan oleh keputusan DAB untuk memutuskan rayuannya tanpa alasan DB. DB dan DAB mempunyai budi bicara sama ada menyediakan atau tidak alasan bagi penghakimannnya. Ianya bukan untuk mahkamah bagi menyoal penggunaan budi bicara mereka (lihat perenggan 17 & 19).

(4) Kegagalan DAB untuk menyediakan dokumen yang diminta oleh pemohon untuk menyiapkan rayuannya tidak tidak terjumlah kepada ketidakpatuhan prosedur yang mencacatkan keputusan DB dan DAB.

Ini kerana permintaan pemohon untuk dokumen tersebut dibuat setelah prosiding DB selesai dan DB telah memutuskan perkara tersebut. Mengenai permintaan untuk pendengaran lisan oleh pemohon, ianya bukan hak pemohon tetapi berada dalam budi bicara kedua-dua DB dan DAB sama ada untuk membenarkan atau tidak permintaan tersebut. Peraturan 37(2) dan (4) Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 secara tersurat memperuntukkan bahawa pemohon hanya berhak membuat representasi bertulis berkenaan dengan pertuduhan tersebut (lihat perenggan 22–23).

(5) Mahkamah hanya akan campur tangan dalam kes-kes tatatertib di mana terdapat ketidakpatuhan prosedur yang menjadi asas dalam proses pembuatan keputusan. Ianya bukan tugas mahkamah untuk meneliti proses pembuatan keputusan DB dan DAB dengan teliti bagi mengesan kemungkinan kesalahan kecil. Fungsi mahkamah adalah hanya menyemak proses tersebut bagi memastikan bahawa kategori luas keadilan semula jadi dan proses sewajarnya telah dipatuhi (lihat perenggan 24).

(6) Keputusan DB dan DAB untuk memecat pemohon adalah berkadaran atau munasabah tetapi dapat dibenarkan dengan alasan bahawa Jabatan Imigresen menjalankan fungsi yang sangat penting dalam melindungi agar pendatang asing tanpa izin dari memasuki negara ini dan pegawai yang bekerja di Jabatan tersebut adalah diminta untuk bertindak dengan penuh integriti, kejujuran dan ketekunan untuk melindungi kepentingan keselamatan negara (lihat perenggan 26).]

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223, CA (refd)

Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935, HL (refd)

Ezaky Mulya bin Sapawi v Dato' Sri Nadzri Siron (Pengerusi Lembaga Tatatertib, Kumpulan Sokongan (No 1)) & Ors [2020] MLJU 1920; [2020] 1 LNS 1557, HC (refd)

Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563, FC (refd)

Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149; [2012] 1 MLRA 661, FC (refd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417; [2001] 2 CLJ 525, FC (refd)

Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin Rashid [2006] 2 MLJ 108, CA (refd)

Palautah a/l Sinnappayan & Anor v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2010] 3 MLJ 295; [2010] 2 CLJ 133, FC (folld)

Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia &

Anor [2007] 7 MLJ 1; [2007] 6 CLJ 245, FC (refd)
Shariffah Masturah bt Mohamad Japara v Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No 1) Jabatan Imigresen Malaysia, Putrajaya & Ors [2020] MLJU 220; [2020] 6 MLRH, HC (folld)
Syed Alwee bin Syed Mansor v Panglima Tentera Laut Diraja Malaysia & Anor [2018] 12 MLJ 380; [2018] 1 LNS 599, HC (folld)
T Ganeswaran lwn Suruhanjaya Polis Diraja Malaysia dan satu lagi [2005] 6 MLJ 97; [2005] 3 CLJ 302, CA (refd)
Vijayarao a/l Sepermaniam v Suruhanjaya Perkhidmatan Awam Malaysia [2018] 12 MLJ 17, FC (refd)

Legislation referred to

Federal Constitution art 7(2)
Public Officers (Conduct and Discipline) Regulations 1993 regs 37, 37(2), (4), 38, 38(g)
Public Services Disciplinary Board Regulations 1993 regs 14, 15(1), 15(3), (4), 16(1), (2), (3), (4)
Rules of Court 2012 O 53

Ebrina bt Zubir (Maniam Nair & Co); (Norhisham & Co) for the plaintiff.
Jailani bin A Rahman (Johor State Legal Advisor's Office) for the defendants.

Ahmad Murad JC:

INTRODUCTION

[1] This is an application for judicial review by the applicant seeking the following prayers:

(a) an order of certiorari to quash the dismissal of the applicant by the respondent;

(b) an order of mandamus directing the respondents to reinstate the applicant to his post prior to the dismissal;

(c) an order of mandamus that the respondents pay the amount of salary payable to the applicant from the date of dismissal, inclusive of all the emoluments, allowances and other benefits payable to the applicant from the date of his dismissal until full settlement; and

(d) cost in the cause.

BACKGROUND FACTS

[2] (a) the applicant was an Immigration Officer Grade KP17 who commenced his duties with the Immigration Department sometime in the year

2011, and was based at Pejabat Imigresen Bangunan Sultan Iskandar, Johor ('BSI'); and

(b) a disciplinary investigation was carried out against the applicant pursuant to a report received regarding his conduct which was alleged to be in breach of the Public Officers (Conduct and Discipline) Regulations 1993 ('the POR') when he was working at BSI. He was accused of two charges and two alternative charges as contained in exh MFAA1 of the applicant's affidavit *sokongan*. Disciplinary action was taken against the applicant under the POR with a view to dismissal and/or reduction in rank (see reg 37).

[3] (a) on 4 January 2016, the applicant was served with a show cause letter, titled 'Surat Tindakan Tatatertib Dengan Tujuan Buang Kerja atau Turun Pangkat' ('the first show cause letter') and dated 17 November 2015, from the first respondent. The first show cause letter contained three charges for offences committed in the years 2012 and 2013. He The applicant was required to give his reply and make his representation to the charges against him within 21 days of receipt of the letter;

(b) the applicant replied to the first show cause letter some time in 2016 but could not provide the said letter as proof, as he claimed to have misplaced his copy of it. There was no decision on the first show cause letter;

(c) on 10 February 2017, the second respondent issued another show cause letter to the applicant ('the second show cause letter'). This second show cause letter contained four charges and two alternative charges for misconduct allegedly committed by the applicant in the years 2012 and 2013. The applicant was informed by the second respondent that the first show cause letter had been cancelled;

(d) in the second show cause letter, the applicant was charged with having placed his endorsement 'chop' for exiting the country in the passports of one Vietnamese citizen and two Filipino citizens without them being present at the 'kaunter pemeriksaan Imigresen'. He was also charged with 'failure to enter the data of these Vietnamese and Filipino citizens in the departments system after endorsing in the passports the exit/entry details on the same dates'.

The second show cause letter is in exh MFAA2 of the applicant's affidavit in support (encl 3):

(e) the second show cause letter clearly stated that the applicant could be punished under reg 38 of the POR if found guilty by the Disciplinary Authority. The applicant was given twenty one days from the receipt of the said

letter to furnish his representation to exculpate himself from the charge; and

(f) the applicant sent his written representation via a letter dated 13 March 2017 (see exh MFAA3 of the defendant's affidavit in support).

[4] The Disciplinary Board ('DB') held a disciplinary hearing on 7 August 2017. At the hearing, the DB considered the charges against the respondent and the representation made by him. The DB found that the applicant had failed to exculpate himself from the four charges against him. The applicant was found guilty of the four charges against him and consequently, was dismissed from his post with effect from 7 August 2017 under the provisions of reg 38(g) of the POR.

The applicant was informed of the decision via a letter dated 20 October 2017. The same letter stated that the applicant may appeal the decision to the Disciplinary Appeals Board ('DAB') within 14 days from receipt of the DB's decision under regs 14 and 15(1) of the Public Services Disciplinary Board Regulations 1993 ('the 1993 Regulations').

The applicant subsequently submitted a letter of appeal dated 28 December 2017 to the DAB.

[5] The applicant applied to the second respondent to provide him with the necessary documents to enable him to file his response to the letter via a letter dated 24 December 2017 but received no reply. Notwithstanding the absence of any reply to his request, he submitted his letter of representation dated 28 December 2017 without the benefit of relevant documents and materials. In the letter dated 28 December 2017, the respondent also requested for an oral hearing to be held and for the setting up of an Investigation Committee.

[6] After deliberating on the appeal by the applicant at its meeting held on 21 May 2018, the DAB made a decision to affirm the decision of the DB and consequently, to dismiss the appeal by the applicant. The applicant was informed of this decision via a letter dated 28 May 2018.

[7] Dissatisfied with the decision of the DB ('the third respondent') and the DAB ('the fifth respondent'), the applicant filed this application for judicial review for an order of certiorari to quash the decisions of both the third and fifth respondents.

ISSUES TO BE DECIDED BY THIS COURT

[8] The applicant relied on the following grounds to challenge the decisions of both the DB and the DAB:

(a) double jeopardy. This is based on the two show cause letters issued to the applicant. The second show cause letter added new charges after the applicant submitted his representation on the first show cause letter;

(b) breach of the principles of natural justice, because the charges were ambigious vague and contradictory (referring to the alternative charges) and therefore, unsustainable in law;

(c) whether the DB's failure to decide on the alternative charges amounts to a serious flaw in the decision making process;

(d) whether failure to provide grounds of decision by the DB to DAB amounts to procedural impropriety;

(e) whether the failure to supply documents and denial of oral hearing requested by the applicant amounts to a breach of natural justice;

(f) non-compliance with the Public Services Disciplinary Board Regulations 1993 ('the 1993 Regulations'). Whether there was any procedural impropriety in the disciplinary proceedings; and

(g) whether the doctrine of proportionality and *Wednesbury* unreasonableness applies to this case.

THE APPLICABLE LAW

[9] It is trite law that a judicial review is not an appeal against the decision of the disciplinary authority but a judicial *review* of its decision process. *The governing principle in judicial reviews is that the review is restricted to the decision-making process, and not the merits, substance or justification of the decision in question.*

[10] Thus, in dealing with judicial review cases, the court will focus on the manner by which the decisions, actions and/or omissions were allegedly made or omitted by the public authority, and examine if the decisions, actions and/or omissions were tainted with what Lord Diplock described in Council of *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935 as 'illegality', 'irrationality' and 'procedural impropriety' (see *T Ganeswaran lwn Suruhanjaya Polis Diraja Malaysia dan satu lagi* [2005] 6 MLJ 97; [2005] 3 CLJ 302).

[11] The Federal Court in *Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 7 MLJ 1; [2007] 6 CLJ 245 explained:

In essence, in reviewing the decisions of the disciplinary authorities, the court has *very limited review powers* over administrative determinations of public bodies. The court will only intervene in disciplinary cases where there was a *fundamental* procedural flaw, namely whether there has been an error in the process or whether there was procedural irregularity in the decision-making process leading to the public officer's dismissal. The function of the court in a judicial review is to review decisions of the disciplinary authorities and *not to rehear the case by review, re-asses, re-appreciate, reappraise evidence, or draw its own inference as to facts from the evidence*. Weighing and assessing the evidence is the function of the disciplinary authorities. *The court cannot interfere merely because it may come to different conclusions on facts on the same basis of the same evidence* (see *Kerajaan Malaysia v Tay Chai Huat* [2012] 3 MLJ 149 (FC) at pp 165–166).

TWO SHOW CAUSE LETTERS

[12] (a) the applicant submits that the act of the third respondent in issuing a second show cause letter, which included four charges, after the applicant had made his representation to the first show cause letter, amounts to a procedural impropriety which renders the decision of the DB void;

(b) it is apparent that the DB abandoned the first show cause letter against the applicant, which it was entitled to do. Hence, when the applicant was found guilty of the four charges in the second show cause letter, it could not be said the applicant was tried again for the same offence, since the first show cause letter was abandoned, and the applicant was not tried under the first show cause letter; and

(c) the respondents in their reply to the applicant's submission argue as follows:

(i) first of all, the issue of double jeopardy is not a ground relied on in the statement pursuant to O 53 of the Rules of Court 2012. Therefore, the applicant cannot rely on the issue of double jeopardy as it was not a pleaded ground; and

(ii) the DB only deliberated on the second show cause letter. The applicant was never *found guilty* or even convicted of the first show cause letter. The two show cause letters were issued by the Immigration Department, and not the DB. The letters are not relevant to the disciplinary offence that was directed against the applicant. Hence, it cannot be construed as a type of disciplinary proceeding under the 1993 Regulations.

[13] The protection against double jeopardy is provided for by art 7(2) of the Federal Constitution, which reads:

7(2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been

quashed and a retrial ordered by a court superior to which he was acquitted or convicted. A

[14] In the case of *Syed Alwee bin Syed Mansor v Panglima Tentera Laut Diraja Malaysia & Anor* [2018] 12 MLJ 380; [2018] 1 LNS 599, cited by the respondents, Justice Azizah referred to the Federal Court's decision in *Palautah a/l Sinnappayan & Anor v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 295; [2010] 2 CLJ 133 at para 37: B

> [37] In fact, in the case relied by the applicant, in *Palautah Sinnappayan*, the Federal Court made the following finding: C
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> > [14] With respect, we could not agree with the contention of the appellants that the doctrine autrefois acquit applies to the appellant's case. We are of the view that the scope and extent of protection enshrined under art 7(2) of the Federal Constitution only applies to *criminal* offences, wherein a person who has been acquitted or convicted of an offence by the court shall not be tried again for the same offence. D
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> [38] Therefore, the principle of double jeopardy only applies in *criminal convictions*, whereby a person who has been acquitted or convicted of an offence by the court shall not be tried again for the same offence.

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[15] Based on the above, I find that the principle of double jeopardy, or autrefois convict and autrefois acquit, is not applicable to the present case.

THE CHARGES WERE VAGUE, CONTRADICTORY AND AMBIGIOUS, AND THE FAILURE OF THE DB TO DECIDE ON THE ALTERNATIVE CHARGES F

[16] The applicant submits that the disciplinary proceedings were irregular, and tainted with procedural impropriety because the charges were ambigious, vague and contradictory, and that the failure of the DB to decide on the alternative charges amounts to a serious flaw in the decision-making process: G

(a) the four charges against the applicant state that the alleged misconduct were:

> Pertuduhan Pertama: H
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> Bahawa tuan, *Encik Mohamad Faisal Anudin bin Azmi, No K/P: 810625-08-6137, Pegawai Imigresen Gred KP17* semasa bertugas sebagai Pegawai Imigresen Gred KP17 di Pejabat Imigresen Bangunan Sultan Iskandar, Jabatan Imigresen Malaysia Negeri Johor dalam syif pagi jam 0700 hrs hingga 1400hrs di Kawalan Kereta Keluar dan syif malam jam 2200 hrs hingga 0700 hrs (01 Januari 2013) di Kawalan Bas Keluar didapati telah menurunkan cop keluar No J1/278-19/4 bertarikh 31 Disember 2012 ke dalam pasport milik Vo Nguyen Phuong Dao, No Pasport B7056662, Warganegara Vietnam, tanpa kehadiran pemegang pasport berkenaan di I

Kaunter Pemeriksaan Imigresen. Cop Keselamatan Keluar yang terdapat di dalam pasport warganegara Vietnam tersebut juga telah disahkan tulen oleh Bahagian Keselamatan dan Pasport, Putrajaya.

Tindakan tuan merupakan satu kesalahan yang melanggar *PK(O)IM.H.02-02 — PEMERIKSAAN KELUAR MASUK BUKAN WARGANEGARA.*

Perbuatan tersebut membolehkan tuan dikenakan tindakan tatatertib selaras dengan Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 dan boleh diertikan sebagai melanggar tatakelakuan di bawah Peraturan *4(2)(f)*, *4(2)(g)* dan *4(2)(i)* Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 yang berbunyi seperti berikut:-

4(2) Seseorang pegawai tidak boleh —

(f) tidak jujur atau tidak amanah;

(g) tidak bertanggungjawab; dan

(i) ingkar perintah atau berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabah sebagai ingkar perintah.

Pertuduhan Kedua:

Bahawa tuan, *Encik Mohamad Faisal Anudin bin Azmi, No K/P: 810625-08-6137, Pegawai Imigresen Gred KP17,* semasa bertugas sebagai Pegawai Imigresen Gred KP17 di Pejabat Imigresen Bangunan Sultan Iskandar, Jabatan Imigresen Malaysia Negeri Johor dalam syif pagi jam 0700 hrs hingga 1400 hrs di Kawalan Kereta Keluar dan syif malam jam 2200 hrs hingga 0700 hrs (01 Januari 2013) di Kawalan Bas Keluar didapati tidak memasukkan data Vo Nguyen Phuong Dao, No. Pasport B7056662, Warganegara Vietnam ke dalam Sistem Jabatan setelah menurunkan cop keluar bertarikh 31 Disember 2012. Semakan ke dalam sistem ADUKOM mendapati tiada aduan kerosakan sistem dilaporkan pada tarikh tersebut.

Perbuatan tuan ini telah melanggar tatakelakuan di bawah peratiran *4(2)(g)*, *4(2)(i)* dan *4(2)(j)*, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 iaitu:

4(2) Seseorang pegawai tidak boleh —

(g) tidak bertanggungjawab;

(i) ingkar perintah atau berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabah sebagai ingkar perintah; dan

(j) cuai dalam melaksanakan tugas.

Pertuduhan Ketiga:

Bahawa tuan, *Encik Mohamad Faisal Anudin bin Azmi, No K/P: 810625-08-6137, Pegawai Imigresen Gred KP17,* semasa bertugas sebagai Pegawai Imigresen Gred KP17 di Kawalan Kereta Masuk, Pejabat Imigresen Bangunan Sultan Iskandar, Jabatan Imigresen Malaysia Negeri Johor dalam

syif malam di antara 22 April 2013 hingga 23 April 2013 jam 2200 hrs (22 April 2013) hingga 0700 hrs (23 April 2013) didapati telah menurunkan cop masuk No.: J1/278-19/4 bertarikh 23 April 2013 ke dalam pasport milik Vispo Hazel Ann, No. Pasport: EB0980867, Warganegara Filipina, dan Contreras Lady Pearl, No Pasport: EB6698595, Warganegara Filipina, tanpa kehadiran pemegang pasport berkenaan di Kaunter Pemeriksaan Imigresen. Cop Keselamatan Masuk yang terdapat di dalam dua (2) pasport warganegara Filipina tersebut juga telah disahkan tulen oleh Bahagian Keselamatan dan Pasport, Putrajaya.

Tindakan tuan merupakan satu kesalahan yang melanggar *PK(O)IM.02-02 — PEMERIKSAAN KELUAR MASUK BUKAN WARGANEGARA.*

Perbuatan tuan ini telah melanggar tatakelakuan di bawah Peraturan *4(2)(f), 4(2)(g) dan 4(2)(i)* Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 iaitu:

4(2) Seseorang pegawai tidak boleh:-

(f) tidak jujur atau tidak amanah;

(g) tidak bertanggungjawab; dan

(i) ingkar perintah atau berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabah sebagai ingkar perintah.

Pertuduhan Keempat:

Bahawa tuan, Encik Mohamad Faisal Anudin bin Azmi, No K/P: 810625-08-6137, Pegawai Imigresen Gred KP17, semasa bertugas sebagai Pegawai Imigresen Gred KP17 di Kawalan Kereta Masuk, Pejabat Imigresen Bangunan Sultan Iskandar, Jabatan Imigresen Malaysia Negeri Johor dalam syif malam di antara 22 April 2013 hingga 23 April 2013 jam 2200 hrs (22 April 2013) hingga 0700 hrs (23 April 2013) didapati tidak memasukkan data Vispo Hazel Ann, No. Pasport: EB0980867, Warganegara Filipina dan Contreras Lady Pearl, No Pasport EB6698595, Warganegara Filipina ke dalam Sistem Jabatan setelah menurunkan cop masuk bertarikh 23 April 2013. Semakan ke dalam sistem ADUKOM mendapati tiada aduan kerosakan sistem dilaporkan pada tarikh tersebut.

Perbuatan tuan ini telah melanggar tatakelakuan di bawah Peraturan *4(2)(g), 4(2)(i) dan 4(2)(j)* Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 iaitu:

4(2) Seseorang pegawai tidak boleh:-

(g) tidak bertanggungjawab;

(i) ingkar perintah atau berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabah sebagai ingkar perintah; dan

(j) cuai dalam melaksanakan tugas.

(b) reading the four charges, there are sufficient details about the acts of misconduct as well as the time and place where the misconduct was alleged to have been committed.

The four charges are for separate acts. There is nothing vague or contradictory in the four charges.

The language used in the four charges is simple and clear enough for any reasonably literate person to understand, and the applicant, as an Immigration officer, should have no difficulty understanding the charges against him;

(c) notwithstanding the alleged vagueness of the four charges, the applicant was able to make his representation to the four charges with sufficient clarity and in detail. This, in itself, is evidence that the charges are clear and unambiguous; and

(d) on the issue of failure of the DB to decide on the alternative charges, the simple answer is the applicant was not found guilty of those specific charges. Thus, he did not suffer any prejudice from that. If one is not found guilty and suffers no adverse consequence from a non-decision on a charge, there cannot be a procedural flaw or breach of natural justice flowing from such omission.

FAILURE BY THE DB TO PROVIDE GROUNDS TO THE DAB

[17] (a) the applicant submits that the DB's failure to comply with reg 15(3) of the Public Services Disciplinary Board Regulations 1993 ('the 1993 Regulations') is fatal since the regulation is a mandatory provision;

(b) reg 15(3) provides:

> 15(3) on receipt of the appeal under sub-regulation (2) the Disciplinary Board shall cause to be prepared a copy of the records of proceedings of the Disciplinary Board, including the grounds on which the Disciplinary Board relied upon in arriving at its decision.

(c) reg 15(4) provides:

> 15(4) The records of proceedings prepared under sub-regulation (3) together with the grounds of decision and the appellant's appeal shall be sent to the Disciplinary Appeals Board not later than thirty days from the receipt of the appeal by the Disciplinary Board.

(d) in preparing the records of proceedings, the DB did not include the grounds for its decision;

(e) it should be noted that sub-reg (4) requires the DB to provide its grounds to the DAB and *not* to the applicant. The DAB had noted the absence of the grounds but nonetheless, was satisfied with the decision of the DB, and after due consideration, decided to affirm the DB's decision; and

(f) although I have not found any cases touching on these regulations, I am of the view that regs 15(3) and 15(4) are more directory rather than mandatory requirements. Since sub-regs (3) and (4) do not specify that the grounds should be provided to the applicant but only to the DAB, the applicant would not be prejudiced by the DAB's decision to consider the appeal in the absence of grounds from the DB.

[18] On this issue, I drew guidance from the decision of Wong Kian Kheong J in the case of *Shariffah Masturah bt Mohamad Japara v Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No 1) Jabatan Imigresen Malaysia, Putrajaya & Ors* [2020] MLJU 220; [2020] 6 MLRH.

The learned judge referred to the decision of Zainun Ali FCJ in the Federal Court case of *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563, at para 113 as follows:

> [113] The correct application of the law concerning the duty of administrative authorities to give reasons for decisions has been explained by the Privy Council in *Dr Stefan v The General Medical Council* [1999] 1 WLR 1293. It must be emphasised that the law does not impose a general duty upon decision-makers to give reasoned decisions. The trend of the law is towards giving reasons, but on a case by case basis. Among the determining factors when reasons ought to be given by administrative decision-makers lie in the nature and character of the decision making and when the giving of reasons will be required as a matter of fairness and openness.

His Lordship then decided that the DB and DAB have discretion whether to give reasons for a decision depending on the facts and justice of each case. He then concluded that in the case before him, the DB and DAB were not required to give reasons for their decision since the first and alternative charges were simple and not complicated.

[19] Likewise, in the present case, the charges are straightforward and uncomplicated. Even in the absence of grounds by the DB, and the provisions in reg 15(3) and 15(4) being more directory than mandatory, I am of the view that the third and fifth respondents have discretion whether or not to provide grounds for their decisions. It is not for this court to question their exercise of discretion.

WHETHER FAILURE TO SUPPLY DOCUMENTS AND DENIAL OF ORAL HEARING AMOUNTS TO A BREACH OF NATURAL JUSTICE

[20] Upon receipt of the letter dated 24 December 2013, the applicant made a written request to the DAB for documents to be supplied to him to prepare his appeal (see exh MFAA5). He did not receive any response to this request.

The respondents submit that failure to supply the requested documents does not amount to a breach of natural justice because this request was only made after the DB concluded its hearing.

In support of this submission, the respondents relied on the following cases:

(a) in the case of *Vijayarao a/l Sepermaniam v Suruhanjaya Perkhidmatan Awam Malaysia* [2018] 12 MLJ 17, the Federal Court held at para 82:

> [82] The *right to documents* related to the disciplinary proceedings is closely linked to the right for an oral hearing. Both are important elements in fulfilling the right to be heard to be afforded to the officer concerned. We are of the view that, in view of the serious charges levelled against the appellant which ultimately had resulted in him being dismissed from the service, in all fairness, the appellant ought to have been supplied with all the relevant documents and reports requested by him particularly since the disciplinary authority had relied on those documents *to decide that a prima facie case had been proved against the appellant*, to enable him to *make an effective and meaningful defence to the charges*. There is a plethora of authorities that deal with the issue (p 164).

(b) in the case of *Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin Rashid* [2006] 2 MLJ 108, Gopal Sri Ram JCA succinctly stated that:

> [5] On the facts of the present case, the notes of proceedings were requested for and refused *after the disciplinary enquiry had concluded* and the decision to dismiss had been made. *So, it could not have had any bearing whatsoever on the procedure that had been adopted*. It may have been different if there had been a partial hearing and an adjournment. If, in those circumstances, the plaintiff had asked for the notes recorded at the previous session, it may have been unfair to have refused them if, for example, he needed them to confront a witness or to make a submission. But that is not the fact pattern here. There is, here, *no nexus whatsoever between the refusal to supply the notes and the conduct of the enquiry*.

[21] In reliance on the above cited cases, the respondents submit as follows:

(a) there will only be a right to documents and a breach of natural justice if the applicant had requested for the documents *that have been relied on* by the DB *to decide that a prima facie case* had been proved against the

appellant *before* the hearing by the DB and dismissal punishment had been meted out; A

(b) however, failure to comply with the said request, *after* the DB hearing, *does not result in* a breach of natural justice for the following reasons:

(i) the applicant *had made* his representation and submitted his defence; B

(ii) the DB *has decided* on the matter;

(iii) the DAB operates as an appellate court;

(iv) the DAB is *only limited and confined* to reg 16(2), (3) and (4) of the 1993 Regulations, *not others*; C

(v) the DAB will only peruse the documents prepared by virtue of reg 16(1) and (2) of the 1993 Regulations, and decide *the merit* on those presented documents *and no other document*; D

(vi) the DAB *cannot take any other extraneous* information outside the prepared records in determining the applicant's appeal;

(vii) the DAB will only exercise its *sole discretionary power in pursuance of reg 16(3)* of the 1993 Regulations as it thinks it fair; and E

(viii) the DAB must decide the appeal as prescribed in *reg 16(4)* of the 1993 Regulations.

[22] (a) thus, the respondents submit that: F

(i) since the applicant requested for the documents *after the DB proceedings had concluded, there were no procedural improprieties or irregularities by* the respondents in not supplying the documents;

(ii) any alleged irregularities raised by the applicant in those circumstances are not relevant matters for consideration by the court; G

(iii) there is no serious deprivation of rights or bias as contended by the applicant; and

(iv) the applicant was correctly subjected to the proper disciplinary proceedings as mandated by the 1993 Regulations. H

(b) I am in agreement with the respondents' submissions on this issue and I find that the DAB's refusal to supply the requested documents does not amount to a procedural irregularity that would vitiate the decisions of the DB and DAB. I

[23] On the request for oral hearing by the applicant, I am of the view that this is not an entitlement of the applicant but merely the discretion of both the DB and DAB whether to allow the request. This position is stated in reg 37(2)

and (4) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the POR') which expressly provide that the applicant is only entitled to make a written representation in respect of the charges. Justice KK Wong in the case of *Ezaky Mulya bin Sapawi v Dato' Sri Nadzri Siron (Pengerusi Lembaga Tatatertib, Kumpulan Sokongan (No 1)) & Ors* [2020] MLJU 1920; [2020] 1 LNS 1557, also arrived at a similar conclusion, following the decision of the Federal Court in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 525.

NON-COMPLIANCE WITH THE 1993 REGULATIONS AND WHETHER THERE WAS ANY PROCEDURAL IMPROPRIETY IN THE DISCIPLINARY PROCEEDINGS

[24] I have addressed most of the applicant's submissions on this issue in the earlier paragraphs of my grounds. The Federal Court decided in the case of *Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 7 MLJ 1; [2007] 6 CLJ 245, cited in para 12 earlier, that the court will only intervene in disciplinary cases where there was a *fundamental* procedural flaw in the decision-making process. Thus, it is not the duty of this court to peruse the decision-making process of both the DB and DAB with a magnifying glass to detect possible minor errors. As has been emphasised by the earlier cases, this court's function is to merely review the process to ensure the broad categories of natural justice and due process have be complied with.

WHETHER THE DOCTRINE OF PROPORTIONALITY AND *WEDNESBURY* UNRESONABLENESS APPLIES TO THIS CASE

[25] The respondents submit as follows:

(a) the applicant has failed to show that the DB and DAB had acted ultra vires or unfairly and that the disciplinary action taken against him was against the law, breached the rules of natural justice, or that there were errors on the face of the records; and

(b) the applicant has failed to show grounds upon which the honourable court should exercise its powers of judicial review.

[26] I do not find the decisions of both the DB and DAB to dismiss the applicant to be disproportionate or unreasonable but justifiable for the following reason:

The Immigration Department performs a very crucial function in guarding against illegal immigrants entering our country and the officers working in that Department are required to act with utmost integrity, honesty and diligence to protect our national security interest. Thus, the decisions of the DB and DAB

to dismiss the applicant cannot be said to be disproportionate or unreasonable.

In *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 1 MLRA 661, the Federal Court explained:

> [29] ... In the normal course, it is the disciplinary authority which is the best judge as to whether the person should be dismissed. In that context, the court can only exercise its powers of interference in a limited number of cases where it is shown that the decision to suspend is arbitrary and/or a mala fide exercise of power and/or colourable exercise of power. These are the parameters on which a disciplinary authority must consider when exercising its powers under the GO (Chapter D). It is not for the courts to interfere with exercise of discretion by the disciplinary authority otherwise than in the circumstances set out.

[27] For the reasons aforesaid, I will not exercise my discretion to grant the orders of certiorari or mandamus prayed for in this case. I therefore dismiss encl 1 with costs of RM3,000 subject to allocatur fees.

Application dismissed.

Reported by Ashok Kumar